INDEX.

TABLE OF CASES

IN THE

Supreme Court of the United States

OSCAR LESER ET AL.,

versus

J. MERCER GARNETT ET AL.

PETITION FOR WRIT OF CERTIORARI TO BE ISSUED TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

Petitioners are male citizens, residents and qualified voters of the State of Maryland. The Constitution of the State of Maryland limits the right of suffrage to adult male citizens possessing certain qualifications as to residence. The laws of Maryland provide a method of having the right of any person to vote in any given election precinct judicially determined by challenging such person's right to register as a voter, and if the challenge be overruled and the person registered by the officers of registration, by petitioning a Court having jurisdiction in the City or County where the matter arises to correct the registry by striking off the name of the person so challenged. Under the election laws of Maryland no

person whose name does not appear on the book of registry can cast a vote. (1 Annotated Code of Md., Art. 33, Secs. 19, 25).

Petitioners challenged the right of two women, Cecilia Streett Waters and Mary D. Randolph, to register as voters of the Seventh Precinct of the Eleventh Ward of Baltimore City, on October 12th, 1920, on the ground that being women they were not entitled under the State Constitution to vote, and that the alleged Nineteenth Amendment to the Federal Constitution which was proclaimed to have been ratified by the Legislatures of three-fourths of the States, and to be a part of the Constitution of the United States, by the Secretary of State of the United States on August 26th, 1920, prohibiting discrimination in the qualifications of voters on account of sex (a) was never legally proposed, ratified or adopted as a part of the Constitution, and (b) was invalid as being in excess of any power to amend the Constitution of the United States conferred by the provisions of Article V thereof. The challenge was overruled and the women were registered as duly qualified voters, and thereafter the petitioners appealed by petition, as provided by law, to the Court of Common Pleas, which after hearing testimony and argument, refused the prayers or instructions offered by petitioners and dismissed the petition.

Petitioners appealed to the Court of Appeals of Maryland, being the highest tribunal in the State in which a decision could be had, and that Court, on June 28th, 1921, affirmed the order of the Court of Common Pleas dismissing the petition.

Certain prayers were offered by the petitioners containing the legal propositions on which they rested their case. All were rejected by the Court. They are set forth

in the Fourth Assignment of Error filed in the Record of this cause. Among them are the following:

PETITIONERS' FIRST PRAYER.

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is not an amendment within the scope of the grant of power to amend contained in Article V of said Constitution.

PETITIONERS' SECOND PRAYER

The Court rules as matter of law that the alleged Nineteenth Amendment of the Constitution of the United States is in conflict with the proviso contained in Article V of the Constitution of the United States.

PETITIONERS' THIRD PRAYER.

The Court rules as matter of law that a State's suffrage in the Senate means the votes cast in the Senate by Senators elected in the State by the people thereof, through Electors, who possess the qualifications of Electors of the most numerous branch of the State's Legislature, which qualifications are prescribed and determined by the State in its Constitution or laws, and any purported amendment to the Federal Constitution which nullifies, substitutes or alters the qualifications of such Electors so prescribed and determined by the State, so as to confer the power of electing Senators upon persons on whom the State has not conferred it, or to deny, diminish or dilute such power in the persons upon whom the State has conferred it, operates to deprive the State of its suffrage in the Senate, and that the alleged Nineteenth Amendment would so operate.

PETITIONERS' FOURTH PRAYER.

The Court rules as matter of law that the consent of a State to such changes in the Federal Constitution as by the provisions of Article V require such

consent, can only be expressed, whether directly or indirectly, through the voice of the majority of those persons upon whom it has conferred through its Constitution and laws the power to vote, and that any measure which confers such power upon other and different persons, or denies, diminishes or dilutes such power in those upon whom the State has conferred it, deprives the State of its power by any means to consent to such changes or amendments, and is inconsistent with the proviso contained in Article V of the Constitution of the United States; and that the alleged Nineteenth Amendment is such a measure.

The Legislature of Maryland, at its regular session of January, 1920, rejected the Nineteenth Amendment and by resolution challenged its validity, even if ratified by other States, as part of the Constitution, on the ground that it was in excess of the powers of amendment conferred therein. At a special session called in September of the same year a resolution was again offered to ratify the amendment which already had been proclaimed, but the Legislature again refused to ratify it and defeated the resolution.

It appears from the foregoing prayers, as well as from the challenge of said female registrants and from the petition itself, that the petitioners claimed a title, right, privilege or immunity under the Constitution of the United States, and that the said female registrants, and other female citizens of Maryland who intervened in the case by petition, and were represented by counsel at the hearing, both above and below, in opposition to the petitioners, also claimed a title, right, privilege, or immunity under the Constitution of the United States. The right or immunity so claimed by the said respondents and intervenors, namely, the right to vote, or immunity from discrimination on account of sex in voting qualifications,

was sustained by the judgment of the highest Court in Maryland in which a decision could be had. The right or immunity claimed by the Petitioners, namely, not to have their votes nullified or diluted by the addition of persons legally disqualified, through the adoption by Congress and the Legislatures of other States of an alleged amendment not authorized by the provisions of Article V of the Constitution, and in fact forbidden by said Article, was disallowed by the highest Court in the State in which a decision could be had.

The Court also disallowed the right (or immunity) claimed by petitioners under the Constitution not to have their votes nullified or diluted by the addition of persons disqualified to vote, but claiming to have the right to do so by virtue of an alleged constitutional amendment, which, however, petitioners aver never received the assent of the Legislatures of three fourths of the States as required by Article V of the Constitution.

The decision of the Court of Appeals of Maryland was, therefore, against the title, right, privilege or immunity, especially set up or claimed by the petitioners under the Constitution, particularly under Article V thereof, and in favor of the title, right, privilege or immunity set up or claimed by the respondents under the alleged Nineteenth Amendment to the Constitution.

The petition was brought for the express purpose of testing the validity of the Nineteenth Amendment, and of testing the limitations on the power to amend the Constitution expressed in Article V thereof, or implied from that and other clauses of the Constitution. The Court of Appeals of Maryland decided in favor of the alleged amendment and against the limitation expressed in Article V, and all other limitations on the amending

power set up or claimed under various Articles or sections of the Constitution.

Petitioners therefore pray that the writ of certiorari issue from this Court to the Court of Appeals of Maryland, in the usual form permitting a review on the record as made of the questions involved in this case.

.....,

.....,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

LIMITS OF POWER OF AMENDING CONSTITUTION EXCEEDED BY XIX AMENDMENT.

1. **THE POWER OF AMENDMENT CONFERRED ON CONGRESS AND STATE LEGISLATURES BY ARTICLE V IS SUBJECT TO THIS EXPRESS LIMITATION:**

> **"PROVIDED THAT NO STATE WITHOUT ITS CONSENT SHALL BE DEPRIVED OF ITS EQUAL SUFFRAGE IN THE SENATE."**

The right of the States to exercise equal suffrage in the Senate, and their power to express or to refuse consent to amendments of the Constitution attempting to deprive them of such equal suffrage, necessarily involves their independent control over their own internal suffrage.

If a State be compelled to suffer dictation as to who may or may not select its Senators, or members of the Legislature, or Conventions, then such Senators or members cannot be the free choice of their State and cannot, therefore, vote in her name or express her will.

Suffrage of States in the Senate.

Let us suppose that a Constitutional Amendment be carried providing that in the future the Senators shall be appointed by the President. No one could deny that the suffrage of the States in the Senate would have been thereby abolished. And so if an amendment should confer on the President the power of designating electors for Senators, even though residents of the sev-

eral States to which respectively an equal number of Senators would be apportioned, no one could say that the Senators chosen only by Presidential appointees within the States would exercise in the Senate the suffrage of the States.

No difference in principle is perceived between such amendments and an amendment prescribing either affirmatively or negatively the qualifications of electors. Once concede that electors in a State may be qualified by a power external to that State and the State's suffrage in the Senate has been subjected to such external power, and therefore taken from the State.

The proviso of Article V excludes from the scope of the amending power a State's suffrage in the Senate, without the State's consent. Therefore it also excludes from the reach of such power, to impair or alter, the State's right to express or to refuse to express its consent. These two rights form the irreducible minimum of a State's corporate individuality as expressed in the Constitution.

No method is perceived by which the suffrage may be exercised or the consent of a State may be given except through the medium of electors, who under the Constitution must designate the Senators to exercise its suffrage or the legislators or members of a convention to express its consent. Manifestly if these electors may be changed by external power, the power that changes them may keep in view its desired ends and by suitable provisions so designate the electors that those ends may be attained. Thus the State's right to consent or to refuse to consent to amendments would be done away.

For instance,—let the end desired be the abolition of the equality of the States in the Senate,—an end for-

bidden by the Constitution without the consent of all the States. An amendment may, however, in the view of our opponents, be proposed by Congress and ratified by three-fourths of the legislatures, providing that all electors shall be subject to a test oath in which they swear to support the principle of proportionate representation in the Senate. All persons unable to subscribe to such an oath would be automatically disfranchised, and the legislatures of all States consisting only of persons favorable to proportionate representation, would thereupon unanimously ratify an amendment abolishing the equality of the States in the Senate.

Of what value then is the guaranty to the States of their equal suffrage in the Senate?

Our System of Balance of Power.

The American system of government was novel in several particulars when adopted. In none more so than in the wholly new scheme of a balance of power between the people viewed numerically, and divided into equivalent fractional units, on the one hand, and on the other, the same people viewed in their organized, corporate, responsible capacity, as constituting a number of self-governing communities, with historical, social and legal institutions and traditions of their own. It would be inaccurate to say that this latter side is only the conservative side of the American people. The Senate is perhaps in general a more conservative body than the House, but the individual States which have elected the Senators have often been and still are the seed beds of every sort of "liberal," "progressive," or "radical" experiment in government. Without such communities in which such experiments could be made at a minimum of risk to the country as a whole it is hardly to be doubted that popular discontent would not infrequently

assume in this country a form far more menacing to orderly and civilized progress than it has ever done.

On the other hand, many salutary and highly practical reforms now generally in force throughout the land might never have been adopted at all, if it had not been possible to try them, State by State, until their desirability was demonstrated.

The independent existence of the States is the one fundamental element of balance in the Constitution. The other great check, the power and duty of the Courts to declare unconstitutional legislation void, has its only *raison d'être* and its only permanent sanction in the duality of government. Without this duality the power of amending the Constitution would be so simplified as to insure the supremacy of temporarily popular forms of legislation over any general principle of right no matter how solemnly declared or established in the so-called fundamental law.

The duality of government can only survive, however, if its ultimate constitutional sanction—the unamendable proviso of Article V—is given full effect.

Senators of Their Own Selection.

Unless the States are protected in their right to vote their sentiments through Senators of their own selection whose representative character cannot be undermined by changing, against its will, the whole nature of the constituency that elects them, then the people in their organized, corporate, responsible capacity are robbed of their voice in the government.

The people of Maryland, an ancient, organized, responsible commonwealth, had the right to be represented in the Senate by two Senators elected

by their legislature, or—since the 17th Amendment to which they willingly consented—by the voters who form the constituency of that legislature, and are authorized by the laws of the State to exercise the franchise and, either directly or by representatives, express the sovereign will. The Nineteenth Amendment, to which the people of Maryland did not consent either directly or indirectly, divides in half the voting power of these voters by adding an equivalent number of other persons who were never authorized by the laws of the State to vote at all. That these persons are women has nothing to do with the case. The suffrage of the State in the Senate has been subjected to a change whose effect cannot be measured, but which may be altogether radical. Certainly if this can be done in regard to one electoral qualification it may be done in regard to any others, and the guarantee against depriving the State of its suffrage in the Senate may be nullified,—indeed has been nullified,—by changing it in kind if not in number. Such a method may more completely disfranchise the State than a reduction of the Senatorial representation to a proportionate basis, because if the very electors can be changed without the will of the State its actual vote in the Senate can be so changed.

Fixing Qualifications of Voters.

The fixing of qualifications of voters is one of the highest attributes of sovereignty. The whole nature of the government, whether oligarchic, plutocratic, aristocratic, democratic, depends on this. If the American people really constitute a sovereign nation they ought to retain the power in their own hands of fixing these qualifications. The Constitution so left it, and in order to do this sacrificed the pedantic desire for uniformity. The qualifications for suffrage have therefore been almost always and everywhere in America what the prevailing

public opinion dictated. The early aristocracies and oligarchies developed into democracy through this sovereign power. But if the qualifications of voters are prescribed in the Constitution then this power is withdrawn from the people entirely. A few legislators in a few small States (e. g., 167 State Senators properly distributed among thirteen State Senates), can block any change. The free expression of public opinion falls beneath the dead hand of an arbitrary, virtually irrepealable standard. Not only is the free suffrage of the States taken away, but the highest sovereign attribute of the American people is subjected to the control or the caprice of a few local assemblies.

The granting or enlarging of powers in the Constitution to the Federal Government may not lessen the control of the people as a whole upon their exercise, but the writing in the Constitution of a restriction on the qualifications for the electoral franchise actually withdraws from the people of the United States the power of deciding how and by whom they wish to be governed.

The most essential question, in whom shall ultimate power be reposed, was therefore left to the people in their locally organized, responsible, corporate communities, because there only could they act with reasonable directness under conditions of full and open discussion and definite responsibility. As Chief Justice Marshall says: "When they act, they act in their States." (*McCulloch vs. Maryland*, 4 Wheat. at 402.)

The Corporate Voice of the States.

The direct or indirect expression of the corporate voice of these self-governing communities having a distinct individuality and a historic continuity is truly the voice of the American people. It is only in the giving of

such expression by communities that adequate public discussion,—the exchange of views among neighbors, acquaintances and the leaders of public opinion,—can be had. If the voice of these communities, with their local points of view,—even their idiosyncracies,—be silenced, American democracy will be cut adrift from its moorings and start under unknown masters upon an uncharted sea.

It may be argued that when three-fourths of these organized communities attach so little value to their corporate existence and suffrage as to be willing to surrender it, the principle of State indestructibility has outlived its usefulness. Even so, a Court sworn to support the Constitution which enshrines this principle could not conscientiously refuse it its high sanction, as a part of that supreme law which it is bound to enforce. But from a different point of view the Court's duty is the same. One-fourth of the States today may contain within their limits a majority of the population and far more than a majority of the wealth and organized industrial power of the land. The abdication by the remaining three-fourths of their corporate existence and functions might not, therefore, be in accordance with the judgment of even a numerical majority of the American people. But were all the States save one to abdicate today, the opinion of that one might well prevail ten years hence when the temporary delusion of the rest had run its course. In the Convention of 1787 the small States of Delaware, Connecticut and New Jersey almost alone seemed to care for the perpetuation of their individuality as communities, but in 1798 the great State of Virginia led the way in defence of that principle its representatives in the Convention had sought to destroy, and for sixty years the most populous and powerful of the States followed its lead. States readily consent to forego their privilege when they desire measures which are favored by the

majority; but when they find themselves in the minority they take a different attitude.

If the Constitution exists not for a day, but for a period of time that is intended to coincide at least with the extent of the loyalty of reasonable and intelligent men to its main purposes and provisions, then until that period shall have elapsed it must be protected by the Court which it had established for its own protection.

No Mandate in the Ratifying States.

In the present case it must be remembered that of the thirty-six States proclaimed by the Secretary of State as having ratified the Nineteenth Amendment, twenty-nine did so at special sessions of their Legislatures called for the purpose at a time when a national presidential election was approaching, and not one of these twenty-nine Legislatures was elected by the people at a time when the amendmnt was in issue, it having been proposed by Congress subsequently to their election. In nine of these twenty-nine States, however, the people had by popular vote rejected woman suffrage amendments to their State constitutions, often by heavy majorities, from time to time between the years 1914 and 1918, inclusive, while in five others the sentiment in favor of woman suffrage had never been strong enough to induce their Legislatures to propose such amendments.

There can, therefore, not only be no presumption of a popular mandate in favor of ratification in fourteen of the alleged ratifying States, but there is the strongest possible reason for believing that their Legislatures misrepresented and virtually defied their constituents by voting for a measure that even in its purely local form had never been desired or had been expressly repudiated. For instance, the Ohio Legislature, elected ~~after~~ before the

amendment was proposed, in ratifying it at a special session in June, 1919, ignored adverse popular majorities on State woman suffrage amendments of 87,455 in 1912, 182,905 in 1914, and 146,120 in 1917. The West Virginia Legislature, if counted as ratifying, similarly ignored an adverse majority of 98,067 at a referendum on woman suffrage held in 1916. Arkansas, Iowa, Maine, Missouri, Nebraska, North Dakota and Texas likewise voted through special sessions of previously elected legislatures in a sense contrary to the indicated will of their electorates in recent referenda.

We do not mention the eight States which alone ratified at regular sessions of their legislatures, though among these Pennsylvania, New Jersey, Massachusetts and Wisconsin were States where the people had recently and emphatically repudiated woman suffrage at the polls, when submitted directly to their decision. Of these the New Jersey Legislature alone was elected after the Amendment had been proposed. Nor do we emphasize the absence of any mandate from the people of the fifteen woman suffrage States (all of which ratified at *special* sessions of their legislatures) to impose woman suffrage upon other States that for various reasons did not desire it.

The fact remains that only four out of all the ratifying legislatures, to wit, Rhode Island, Kentucky, New Jersey and Vermont were elected after the amendment had been proposed.

The Legislatures of the nine States of Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi and Louisiana, elected in each case after the Amendment had been proposed by Congress, rejected it. The Legislature of Florida has not acted upon it. The action of the Legislature of Tennessee is legally doubtful, as we contend that its final vote of definite rejection should prevail over the preliminary

vote when by a majority of one the House passed a resolution of ratification which it later duly reconsidered under its rules and defeated by a substantial majority.

The record is open, and will convince any unprejudiced mind that the ratification of the Nineteenth Amendment, even if actually and validly obtained in accordance with the Constitution, can only in a highly technical sense be construed as the act of the people of the United States. It may have been done by the accredited agents of the people, but in very many cases those agents acted not only without any evidence that their constituents desired it, but in the face of the most definite evidence that they did not.

It is, therefore, quite idle to base on the ratifications as proclaimed any argument that the American people as a whole are ready to destroy the constitutional scheme of an indissoluble union of indestructible self-governing States. The American people are entitled to rely upon the safeguards of the Constitution, and on the Supreme Court, against the misrepresentative action of political assemblies, just as much when these can plead no popular mandate for their acts as when they can throw the responsibility back on some ill-considered impulse of their electors.

The 33 Male Suffrage States.

The Nineteenth Amendment adds to the electorate of all the thirty-three male suffrage States, including Maryland, a vast body of citizens whom the prevailing public opinion of those States had excluded. In a political sense it changes the composition of those States. In actual fact it changes the vote of those States in the Senate. It does this perhaps less conspicuously than would an amendment excluding property owners, or persons of certain religious faiths, or tillers of the soil, but

it effects a change nevertheless. If any such change can legitimately be made against the will of the State concerned then every such change may be.

PRESUMPTION OF CONSENT TO 15TH AMENDMENT.

The Court of Appeals of Maryland admits this conclusion. Unable to see any distinction in principle between the Fifteenth Amendment adding negroes to the electorate and the Nineteenth adding women, it felt constrained to hold that the validity of one established the vaildity of the other, and to follow the decisions of this Court which without discussing the question had apparently assumed the former to be binding. For no other reason did the Maryland Court hold the Nineteenth Amendment to be valid, expressly refusing to pass upon the objections here made, but recognizing their weight and importance were it free to consider them.

The Maryland Court failed, however, to consider a vital distinction. No one denies that a State may consent to any measure so impairing its individuality as to deprive it of its suffrage in the Senate, and that with such consent an amendment may become valid that is otherwise invalid, at least in the non-consenting State. How that consent may be evidenced is nowhere explicitly stated. Doubtless a State convention could grant it, perhaps a State legislature in the act of ratification. But at any rate if after ratification by other States a State through its legislature accepts the amendment as being in force, holds repeated elections in which the enfranchised voters are not only permitted to participate, but protected by State laws in so doing, and without protest by or on behalf of any of its citizens, pursues this line of conduct for forty-five years, it would be difficult in the extreme for any Court not to entertain the presumption that the consent had been granted or at least could not longer be deemed to be withheld.

No Consent to 19th Amendment.

Leaving out of consideration the very different antecedent circumstances, which this Court may or may not have deemed to have removed the question of consent from the judicial sphere altogether as a matter that was determined politically, in the case of the Fifteenth Amendment, we come to consider the Nineteenth Amendment in the light of the fact that the Legislature of Maryland (elected when the Amendment was in issue, and both the leading parties in their State platforms had declared against its ratification) which alone has attempted to speak and did speak for the people of the State in the matter, has expressly rejected it in a set of denunciatory resolutions of the most positive character. We find also the further fact that after the proclamation of ratification by three-fourths of the States had conferred in the eyes of many persons a binding and irrevocable character on the measure, unless held invalid by the Courts, the Legislature of Maryland was again called into session to pass such acts as would enable the ordinary registration and election machinery of the State to function in the practical exigency foreseen as a result. A resolution to ratify the Amendment was introduced again at this session, as it had been at the previous session, but notwithstanding the pressure from woman suffrage advocates and the sentiment of the large class always anxious to defer to the prevailing side, this resolution was defeated in the State Senate by practically the same two-to-one majority that had defeated it previously. In the House of Delegates it suffered the ignominy of not being deemed worthy of a roll-call. The General Assembly increased the number of registration days and made provision for increasing the number of polling places and facilitating the count of an increased number of ballots and provided that words in the election statutes importing the masculine gender should be construed to include the feminine, and

that the sex of the applicants shall be noted on the books, but yielded no further, and not only did not express any consent to the Amendment, but as stated took occasion to defeat such expression.

While, therefore, it was competent for this Court in *Myers vs. Anderson*, 238 U. S. 368, and in *Guinn vs. U. S.*, *ib.* 347, to ignore objections to the validity of the Fifteenth Amendment, if any were made, for the reason that after forty-five years of active acquiescence on the part of Maryland and all other States, their consent must be presumed, or there would be nothing settled and nothing secure, no such condition here obtains, and unless the objections to the Nineteenth Amendment are believed to be in themselves without weight or merit, we submit that the Court is bound to determine that if this Amendment does in fact exceed the scope of the power of amendment granted to certain agencies by Article V, it is void or inoperative.

2. CERTAIN LIMITS TO THE AMENDING POWER ARE IMPLIED FROM THE NATURE OF THE GOVERNMENT.

If there were no irrepealable proviso in Article V of the Constitution we nevertheless would contend that the power to amend that instrument is not in its nature unlimited, but that by reason and authority this Court is bound to the view that the Constitution recognizes and establishes certain definite relations which cannot be dissolved or seriously impaired without wrecking its structure, quenching its spirit and violating the purpose which the people of the United States had in view in adopting it. We contend that a measure that impairs the fundamentals of these relations is not an "amendment" at all, that neither Congress nor State Legislatures ever were intended to have any power to violate the primary purposes of their creation or existence.

The fundamentals of our Government and Constitution have been defined by this Court in numerous and weighty opinions, from some of which we will quote:

FUNDAMENTALS OF OUR GOVERNMENT.

"The perpetuity and indissolubility of the Union, by no means implied the loss of distinct and individual existence, or of the right of self-government by the states. * * * 'The People of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,' and 'without the states in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states and the maintenanceof their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible union composed of indestructible states." (*Texas vs. White*, 7 Wall. 700.)

"It is admitted that there is no express provision in the Constitution that prohibits the Federal Government from taxing the means and instrumentalities of the state. Nor is there any prohibiting the state from taxing the means and instrumentalities of the Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" (*Collector vs. Day*, 11 Wall. 113.)

"When the American people created a national legislature, with certain enumerated powers, it was

neither necessary nor proper to define the powers retained by the different states. These powers proceed, not from the people of America, but from the people of the several states, and remain, after the adoption of the Constitution what they were before, except so far as they may be abridged by that instrument." (*Sturges vs. Crowninshield*, 4 Wheat. 193.)

"The powers delegated to the state sovereignties were to be exercised by themselves, and not by a distinct and independent sovereignty created by themselves. * * * In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it and neither sovereign with respect to the objects committed to the other. * * * The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission. * * * We are relieved * * * from clashing sovereignty; from interfering powers; from a repugnancy between a right of one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. * * * Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know that they would not. Why then should we suppose, that the people of any one state would be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests?" (*McCulloch vs. Maryland*, 4 Wheat. 403, 410, 420, 429, 431.)

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"* * * In interpreting the Constitution it must never be forgotten that the Nation is made up of

States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.' Lane County vs. Oregon, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." * * *

"* * * This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

"* * * The act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed." (*Hammer vs. Dagenhart*, 247 U. S. 251, 275, 276.)

Meaning of State Sovereignty.

The word "sovereignty" is without meaning if it does not connote independence in determining the chief question in every political society, namely, in whom to vest the ultimate power or expression of supreme authority within the State. If our States cannot do this *independently*, then their sovereignty is and always has been a sham, and its repeated recognition by this High Tribunal and by many of the greatest jurists who ever

adorned its bench must be deemed mere empty, though high sounding phrases.

Of course we concede that a word cannot be made to mean too much. The fact that our States are called sovereign does not entitle them to all sovereign attributes, for many of these have been surrendered. It is admitted, however, by all that, outside of the powers specifically created and therefore conferred by the Constitution, with regard to electing Senators, Representatives and Presidential electors, all the powers of the States are powers of *residuary sovereignty*,—the residue of sovereign power that belongs to them because they are in fact the sovereign people locally incorporated in separate self-governing communities. This conception is common both to the original States that were once practically little independent nations, and to the newer ones created under the Constitution. They are sovereign because they are the corporate expression and life of the American people.

While they have not all the attributes of sovereignty in themselves, there being another agency or corporation of the people, to wit, the United States, which enjoys those not possessed by the States, yet they cannot be sovereign at all if they are not independent in the matter of determining for themselves the basis and qualification of their electorate, i. e., who shall govern them. If they cannot do this wherein do they differ in kind from municipalities? The latter have no rights which they can plead against the power of the people of the States which create them. No more would the States have if their electorate, and hence their governments, can be made or unmade by outsiders—persons and bodies whom they cannot control.

An Indestructible Union of Indestructible States.

The answer is made sometimes by our opponents that the States in adopting the Constitution *consented*

to forego the privilege of determining who should govern them in final analysis, by conceding such power to a two-thirds majority in Congress wherein they are fairly represented, and the legislatures or conventions of three-fourths of all the States. But is this any answer? Is it not merely begging the question? If the purpose of the framers of the Constitution was as stated by Miller, J., in Texas vs. White, to create an indestructible Union of indestructible states, could they have intended to grant to any governmental agencies the power to destroy what they determined should be indestructible? Would any State have ratified the Constitution if such a purpose had been either avowed or suspected? In many ways the independence of the States was curtailed and the States' Rights advocates of the day zealously opposed ratification for that very reason, but if it had been seriously believed that the actual existence of the States, their power to choose their own State governments, and their power to select their representatives in the Senate, were to exist only on sufferance of a three-fourths majority, it is doubtful if a single State would have ratified the Constitution.

It is true that in the Convention (5th Elliott Deb., p. 551) Roger Sherman expressed the fear that abolition of particular States might be accomplished by Constitutional Amendment, and accordingly he proposed a proviso against affecting any State in its internal police or depriving it of its equal suffrage in the Senate. The brief memorandum of the debate, found in Madison's papers, shows that the Convention felt a specific guaranty of the immunity of a State's internal police might produce embarrassment, as no doubt it would. "Internal police" is nowadays a broad term. The other part of the proviso was accepted, as of course the equality of suffrage was within reach of the amending power unless specially excepted, and the Convention was quite willing that the

great compromise which made possible the adoption of the Constitution should receive this ultimate and definite sanction, and so be set at rest. In guaranteeing the definite right of equal suffrage they were, of course, guaranteeing the existence and, as we contend, the independent and uncontrollable existence of the States to which that right belonged. But even without this specific guaranty, the free existence of the States must have been always intended, for the reason, if for no other, that the Constitution never purported to be a substitute for the State Constitutions, and that it was from beginning to end incomplete and unintelligible unless the independent coexistence of the States were assumed as a postulate.

Destructive Amendments Considered.

Suppose an amendment were passed (ratified by three-fourths of the States), providing that State Legislatures should be abolished and their powers transferred partly to Congress and partly to local boards appointed by the central power and forbidding the assembling of State Conventions. Would this not amount to destroying the States and the Union? How in the future could other amendments be ratified? Not by the local boards, for the people of the United States never conceded the power of ratification to any such bodies whose acts could not bind the people of the States. Amendments would then either be impossible to obtain, or would derive validity solely from the Act of the central power. In place of our Constitution we would then have the despotism of imperial Rome. "*Quod principi placuit habet legis vigorem.*"

Or suppose an amendment (actually advocated by Mr. W. J. Bryan and many others) providing for a national referendum on all matters including constitutional amendments, and of course to be decided by mass vote irrespective of the States. What would then become of

the Congress, equal suffrage in the Senate, ratification of amendments by three-fourths of the States, ratification of treaties by two-thirds of the Senate, guarantee of republican form of government to each State, reservation of powers not granted in the States respectively or the people? A mere numerical majority—the usual small percentage of odd voters, who decide all elections,—would have supreme and uncontrollable power necessarily overriding the States, the Congress, the Courts, the entire Constitution. Obviously the proviso for equal suffrage in the Senate precludes any such amendment without unanimous consent of the States, but even without any such proviso we contend that an amendment of such a nature dissolving both the compact and status of the Union would be *ultra vires*,—that the Constitution was never intended to contain within itself the seed of its own destruction.

Their People Alone Can Destroy the States.

Chief Justice Marshall said that the people of the United States made the Constitution and the people can unmake it. (*Cohens vs. Virginia*, 6 Wheat. at 389.) They may indeed suffer it to expire by neglect, but they can unmake it only in the same manner in which they made it. Their State Governments, directly representative bodies, chose members of a convention, who framed the Constitution. Having framed it they submitted it again to the people who assembled, under Acts passed by their respective State Legislatures, in sovereign conventions of delegates elected in each State for the purpose of passing upon it. The people of those States who, in such conventions assembled, ratified the Constitution became bound thereby, but until they ratified they were not bound. Whenever the sovereign people shall again assemble in conventions in their respective States and agree that their States be abolished and all their powers transferred to a

central autocratic board, cabinet, parliament, or what not, then the Constitution may no longer be the supreme law of the land in those States. But we deny that even with the sanction of two-thirds of both Houses of Congress any State Legislature may vote to deprive the people of its own State of the benefit of that supreme law which they adopted of their free will forever when they entered the Union. Much more strongly do we deny that any number of State Legislatures can by combining or conspiring together with two-thirds of the Congress deprive other States than their own against their will of the rights and privileges which belong to their people as members of the United States. They may indeed amend, they may not destroy, the Constitution.

Constructive and Destructive Amendments Distinguished.

How then could this Court distinguish between constructive and destructive amendments? This difficulty ought not to appear insuperable to a distinguished tribunal of common lawyers. A condition inserted in a deed repugnant to the premises is void. And yet the condition may prescribe nothing immoral or illegal, and its insertion is clear proof that the parties to the instrument whose hands and seals are thereto affixed agreed to it. Yet it is void because it destroys the whole scheme of things contemplated by the parties themselves in making the deed. John Doe conveys his farm to Richard Roe and his heirs and assigns in fee simple forever, on condition that Richard Roe shall never alien it. The condition destroys the fee simple ownership which was the plain purpose of the deed. It is therefore void. And so, when the people of the United States in order to form a more perfect union established a Constitution to be the supreme law of the land in every State that should ratify it, and that should bind the governing powers and officials of

such States as well as those of the Union, they did not assent to the vesting in even a two-thirds majority of Congress or the Legislatures of any number of States of power to destroy the Union made more perfect or to obliterate the self-governing States of which that Union was composed. Their purpose was to create United States, not United provinces. The pretended power in Congress and Legislatures to destroy Union or States or both is a power repugnant to the whole instrument which created the Congress. Without the States in Union there could be no Congress. It never received a mandate to destroy its own creators.

Implied Limitations Illustrated.

Suppose an amendment to the Constitution abolishing the power of the Courts to construe and apply the Constitution and pass on the validity of legislation challenged for unconstitutionality. This would operate to repeal that clause which says the Constitution is the supreme law of the land. Henceforth not the Constitution, but the latest legislative vagary must be the supreme law. If nine States or one State refuses to consent to such an amendment is it not within its right to say that such amendment is without force within its borders? Never did the people of the United States consent that their Constitution could be made less than the supreme law by the action of any body which owed its existence or power to act to that Constitution. The Federal Courts might perhaps be abolished by amendment, fantastic and fatal though such an amendment might be, but as long as any Court remained in the land composed of upright judges so long must any measure clearly contrary to what the people have established as the supreme law of the land be denounced as void when questioned in such Court.

We contend then that the necessarily implied limits to any power under the Constitution, including the broadest

of all,—the power to amend,—are found when the ineradicable duality of the government and of the very conception of the people of the United States, and the supremacy of the fundamental law which, in their dual capacity, they established, are either threatened or attacked. You cannot compound the people into one physical mass of humanity because the words "people of the United States" mean something essentially different, and in so compounding you destroy an essential political and social characteristic of the American people—their locally organized and self-centered sovereignty. Deprive them of this and they become something less than American citizens. "The people of the United States" does not mean a mob or a Tartar Horde. They ordained a Constitution to be the supreme law of the land in order to form a more perfect union and to secure the blessings of liberty to themselves and their posterity. Is it conceivable that they granted to any agency the power to add to their great charter conditions repugnant to its very life?

Scope of the Sovereignty of the People.

We conclude, therefore, that irrespective of the proviso wisely annexed to Article V, and irrespective of all that necessarily follows from its perpetual sanction, there is a thing about the people of the United States that no Congress and no Legislature can take from them, and if they lose it they will have given it up themselves, —and that thing is that they are sovereign. When they get together under their own laws, in their own states, they can govern themselves in respect to all matters which they have not consented to pool with their common representatives in the Federal Government. Their right to govern themselves as to local matters not delegated is ineradicable. The subjects of government may be reapportioned between States and Congress, but the sovereign

individuality of the people in each State, and we may add, their right to speak in Congress through representatives chosen by their own voters, by voters whom they alone have created and qualified as such, cannot be taken from them without obliterating the Constitution which from Marshall to Lincoln was described as a form of government of the people, by the people, for the people. As Marshall said, it is only in their States that they can act at all. Outside of their States all their power is delegated, dissolved among a host of agents whom they cannot directly control. But in their States they can directly make and unmake constitutions and statutes. They can vote directly upon such issues. They can meet in assemblies of limited powers or conventions that recognize no limits except those imposed by membership in the Union, and allegiance to its supreme law. But none of these things can they do, if their electoral franchise may be taken away from them or diluted by agencies that they did not elect and cannot control,—if some 36 State Legislatures without even a mandate from their own people can disfranchise the voters of 48 States. Destroy the power of the people in their several States to decide for themselves who may vote, and their sovereignty has become a myth, their freedom an illusion, their Constitution a fraud.

II.

THE NINETEENTH AMENDMENT WAS NEVER LEGALLY RATIFIED BY THE LEGISLATURES OF THREE-FOURTHS OF THE STATES.

It was also alleged by Petitioners that an insufficient number of States had actually ratified the Nineteenth Amendment at the time it was proclaimed by the Secretory of State, and that although another State (Connecticut) had subsequently done so the number was still short

of the required three-fourths. A second State (Vermont) has since been added, but if Petitioners are right in the assertion that for various reasons Tennessee, Missouri and West Virginia ought not to have been counted as ratifying States, the number is still short, and likely to remain so. Furthermore, if the 11th prayer of Petitioners is sound, to the effect that the power to amend the Federal Constitution does not include the power to amend State Constitutions where these concern solely the establishment or definition of the local government of the States and do not trench on ground that is or may become a field for Federal power, then the ratification by the legislatures of all the 23 male suffrage States counted as having ratified would fall, as an attempt under Article V to amend their State Constitutions in a matter of no lawful concern to any States but their own.

State Constitutional Limitations Violated.

The specific objections to the alleged ratifications by Tennessee, West Virginia and Missouri all come under the general head that local constitutional limitations on the power of the legislatures, or requirements of procedure for the orderly determination of the legislative will, were brushed aside as having no bearing on the ratification of Federal Amendments. The decision of this Court in *Hawke vs. Smith*, 253 U. S. 221, was taken to signify that the Legislatures could not be governed by anything in State Constitutions in ratifying amendments because their power to do so is derived from the Federal Constitution.

We do not so understand Hawke vs. Smith. This Court there held that the Constitution having prescribed legislative assemblies or deliberative conventions as the alternative machinery for ratifying amendments, the States could not add to this machinery a plebiscite or referen-

dum. Nowhere does the Court intimate that the legislatures so designated in the Constitution were to be absolved from obedience to the law of their own creation, i. e., the State Constitutions by which alone they exist, or that they could be freed from the shackles of orderly procedure in ratifying amendments that would bind them in all ordinary acts.

Contentions of Appellees.

We do not understand our opponents or the Court below to deny that only a quorum of each House can act at all, that they can only act when duly called into session in the manner and at the time and place prescribed by their State Constitution, that amendments are subject to reference to committees, reports, recommittals, and all the ordinary incidents of parliamentary procedure, and that they require the separate assent of both houses of each legislature. Yet they contend that reconsideration of a vote, permitted by the rules of a house in the case of any other bill or resolution cannot be allowed, if the vote is in favor of such an amendment, though doubtless they would concede it might be allowed if the vote was against the amendment. They also contend that a well established rule of procedure forbidding a second reconsideration of a vote, after one motion to reconsider had been defeated has no application to a Federal Amendment, and that a presiding officer may refuse to decide a point of order against such renewed consideration of an amendment when the rules provide that all points of order must be submitted to his decision subject to appeal. Furthermore they contend that reasonable provisions of State Constitutions designed to make the Legislature truly representative of the will of the people as contemplated by the Constitution and as described by this Court in Hawke vs. Smith, such as that a legislature elected prior to the submission of an amendment by Congress shall not act

upon it at all (as ordinarily unless called into special session it would rarely have an opportunity to do) are void as withdrawing from the Legislature the omnipotence that they attribute to it in regard to ratification. Lastly they deny the right of the people of any State in their Constitution to forbid their own Legislature to barter away their sacred birthright of self-government as did the people of Missouri.

LEGISLATURES SUBJECT TO THE LAW THAT CREATED THEM.

If there were anything expressed or implied in Article V, or in any other part of the Constitution, that was inconsistent with any of these local provisions it is conceded that they would fall. But none of them exhales anything but the very breath of American free and orderly representative government. Every one knows that legislatures are governed by rules of procedure designed to prevent fraud, chicanery and the betrayal of the people's will. That is why matters are referred to such bodies at all. If they acted as mere mobs they would never have retained a place among our institutions. In spite of these precautions their not infrequent infidelity to their constituents has led in every State to the adoption of bills of rights and other express prohibitions against specifically defined acts which the people consider dangerous. (*Haire vs. Rice*, 204 U. S. 291.)

This was as true in 1787 when the Constitution was framed as it is now, and it was with full knowledge of the general character of such restrictions on legislatures that the convention bestowed on them the power of ratifying amendments. The alternative reference to State Conventions was no doubt especially designed for cases that had been withdrawn from legislative competence by the people. No other ground can be shown for including the alternative, and the discussion in the convention on the

method of ratification of the Constitution itself demonstrates that this was the sufficient reason. (See also *McCulloch vs. Maryland*, 4 Wheat. at 403, 404.)

We, therefore, contend the Court below erred in denying effect to the constitutional restrictions on the legislatures of Tennessee and Missouri, and in denying finality to the vote against ratification by the West Virginia Senate which, according to the rules of that body and their apparently accepted interpretation in regard to all ordinary acts, had become final. Even if the Court disagree with us on one or more of these propositions, we submit that each question so raised is now properly in issue and ought to be decided so as to preclude future dispute.

Respectfully submitted,

THOS. F. CADWALADER,

GEORGE ARNOLD FRICK,

WM. L. MARBURY,

For Petitioners.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1921.

No. 553.

OSCAR LESER, ET AL.,

VS.

J. MERCER GARNETT, ET AL.

MOTION TO ADVANCE.

Now come the plaintiffs in error, Oscar Leser, Eugene H. Beer, Harry M. Benzinger, John R. Bland, Thomas F. Cadwalader, Key Compton, W. Bernard Duke, John H. Ferguson, Joseph C. France, Robert Garrett, J. Hemsley Johnson, Edward D. Martin, C. Wilbur Miller, Charles O'Donovan, Joseph Packard, Thomas Marshall Smith, Theodore E. Straus, Herbert T. Tiffany, Clement S. Ucker, Michael B. Wild, and William P. E. Wyse, by William L. Marbury, their attorney and counsel in this case, and respectfully move the Court to advance this case on the docket of the Court and grant an early hearing therein, for the following reasons:

1. Because this is a test case to decide whether the alleged Nineteenth Amendment to the Constitution of the United States, proposed for the purpose of conferring upon female citizens in every State the right to vote on the same terms enjoyed by male citizens therein, is valid under the provisions of Article V, as a part of the Constitution even in States that have not consented thereto, or is invalid because in direct conflict with Article V, or because beyond the scope of the power conferred by said Article.

2. Because this case is brought to test the validity of the ratification of said amendment by the legislatures of certain States which have heretofore by the Secretary of State of the United States been counted as having ratified the same, and whose votes would be necessary in any event to be counted in favor of said amendment in order to its valid adoption as a part of the Constitution, although plaintiffs in error have offered evidence to show (a) that certain of said legislatures did not in fact ratify said amendment by an affirmative vote of both Houses but on the contrary defeated the same by a negative vote in one House, and (b) that certain of said legislatures were prohibited by the Constitutions of their respective States from ratifying the said amendment, and hence any alleged resolution of ratification that may have been passed by them was *ultra vires* and void.

3. Because this is a test case brought to decide whether the power of amendment conferred on Congress and the legislatures of three-fourths of the States by Article V of the Constitution is virtually unlimited or whether it is so limited that a change in the electorate of the several States as established by their own people in their own State Constitutions can be effected only by the people of each State in the manner they have prescribed or subject to their consent.

4. Because pending the decision of the foregoing questions the validity of the right of women in the State of Maryland and in a large number of other States to vote remains doubtful, and the pendency of elections therein for members of the legislature and for State and local or municipal officials, and for Senators and members of the Congress of the United States, renders the early decision of these questions a matter of the highest public importance.

And in support of this motion the plaintiffs in error respectfully pray the consideration of the Court to the brief and the supplemental brief heretofore filed in their behalf in support of their petition for the issuance of a writ of certiorari herein.

WM. L. MARBURY,

For Plaintiffs in Error.

Service of a copy of this motion admitted this
day of October, 1921.

. . . . . .